89-5383

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

MARK HOWLETT, a minor by and through Elizabeth Howlett, his mother, natural guardian and friend,

Petitioner,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,

Respondents.

Case No. _____

Supreme Court, U.S.
FILED
AUG 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

Petition for Writ of Certiorari

to the

District Court of Appeal of Florida

Second District

Gardner W. Beckett Jr.
(Counsel of Record)
Nelson, Beckett & Nelson
123 Eighth Street North
St. Petersburg, Florida 33701
(813) 822-4084
Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

WHETHER A FLORIDA LOCAL SCHOOL BOARD AND ITS LOCAL SCHOOL OFFICIALS ARE, BY VIRTUE OF THE SOVEREIGN IMMUNITY OF THE STATE, IMMUNE FROM SUIT IN AN ACTION BROUGHT AGAINST THEM IN A FLORIDA COURT PURSUANT TO THE FEDERAL CIVIL RIGHTS ACT OF 1871, 42 U.S.C. SECTION 1983.

TABLE OF CONTENTS

Question Presented for Review. i

Table of Authorities iii

Opinion Below. 1

Jurisdiction 1

Statute Involved 1

Statement of the Case. 2

Reasons Why Writ of Certiorari Should Be Issued. 3

Conclusion 8

INDEX TO APPENDIX

Opinion and Judgment of the Florida District Court of Appeal, Second District. A1

Order of the Supreme Court of Florida. A2

TABLE OF AUTHORITIES

Cases

Carbone v. Overfield, Case No. 44291 (Cuyahoga County Ct. App. Ohio, July 1, 1982), rev'd on other grounds 6 Ohio St.3d 212, 451 N.E.2d 1129 (1983) 7

Cepeda v. Coughlin, 513 N.Y.S.2d 528 (App.Div.) leave to appeal denied, 70 N.Y.2d 602, 512 N.E.2d 550, 518 N.Y.S.2d 1024 (1987) 7

Evans v. Clayton County, 182 Ga.App. 613, 356 S.E.2d 553(1987) 7

Felder v. Casey, ___ U.S. ___, 101 L.Ed2d 123 (1988) 5

Hill v. Department of Corrections, State of Florida, 513 So.2d 129 (Fla. 1987), Cert. den. ___ U.S. ___, 98 L.Ed2d 989, 108 S. Ct. 1024 (1988) 3

Jeffers v. Ray County, 750 S.W.2d 599 (Mo.Ct.App. 1988) 7

McMahon v. Lopez, 199 Cal.App.3d 829, 245 Cal.Rptr. 172 (1988) 7

Martinez v. California, 444 U.S. 277 (1980) 4-7

Moss v. Robertson, 712 S.W.2d 351 (Ky.Ct.App. 1986) 7

Mt Healthy City School Board of Education v. Doyle, 429 U.S. 274 (1977) 6-7

Will v. Michigan Department of Police, ___ U.S. ___, 105 L.Ed2d 45 (1989) 7

Constitution

U.S. Constitution, Article VI, Section 2 4

Statutes

28 U.S.C. Section 1257 1
42 U.S.C. Section 1983 1-2
Section 236.35, Fla.Stat.(1987) 6
Section 236.37, Fla.Stat.(1987) 6

Other

Black's Law Dictionary, Third Edition, 1944 4

IN THE SUPREME COURT OF THE UNITED STATES

MARK HOWLETT, a minor by and through Elizabeth Howlett, his mother, natural guardian and friend, Petitioner, v. SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA, Respondents.	Case No. _____

PETITION FOR WRIT OF CERTIORARI
TO THE
FLORIDA DISTRICT COURT OF APPEAL
SECOND DISTRICT

Petitioner, MARK HOWLETT, respectfully urges that a writ of certiorari issue to review the judgment and opinion of the Florida District Court of Appeal, Second District, rendered February 1, 1989.

Opinion Below

The judgment sought to be reviewed is final and dated February 1, 1989. A copy is appended as Appendix 1 and also appears at 537 So.2d 706. No petition for rehearing was filed.

The Supreme Court of Florida denied discretionary review on May 17, 1989. A copy of its order is appended as Appendix 4. No petition for rehearing was permitted.

Jurisdiction

Jurisdiction of this court to review by certiorari is conferred by 28 U.S.C. Section 1257.

• Statute Involved

The federal Civil Rights Act of 1871, 42 U.S.C. Section 1983 reads in full:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement of the Case

Mark Howlett, a minor, by and through his mother, Elizabeth Howlett, as his mother, natural guardian and next friend, brought an action under the Civil Rights Act of 1871, 42 U.S.C. Section 1983 (hereafter Section 1983) against the School Board of Pinellas County, Florida, and named school officials employed by the Board. The action was brought in the Circuit Court of Pinellas County, Florida, the state court of general jurisdiction having jurisdiction over the parties and subject matter.

The Florida circuit court, on defendants' motion, dismissed the action with prejudice on the theory that the action was barred in a Florida court by the sovereign immunity of the State of Florida.[1]

On appeal to the Florida District Court of Appeal, Second District, Howlett presented the following questions for decision:

> "I
>
> "WHETHER THE QUESTION OF A STATE AND ITS SUBDIVISIONS' SOVEREIGN IMMUNITY TO AN ACTION BROUGHT IN A STATE COURT UNDER THE FEDERAL CIVIL RIGHTS ACT OF 1871, 42 U.S.C. SECTION 1983, IS A QUESTION OF STATE OR FEDERAL LAW?

1. As an alternate ground for dismissal, the circuit court held that the action was also barred as premature because of the failure of Elizabeth Howlett on behalf of her son to exhaust administrative remedies. This alternative ground was not reached by the Florida appellate court. It affirmed the circuit court's dismissal solely on the basis of sovereign immunity (A2).

> "II
>
> WHETHER UNDER FEDERAL LAW A FLORIDA SCHOOL BOARD IS IMMUNE FROM SUIT UNDER SECTION 1983?" (A2)[2]

Relying upon a decision of the Supreme Court of Florida, **Hill v. Department of Corrections, State of Florida**, 513 So. 2d 129 (Fla. 1987), cert. den. ___ U.S. ___, 98 L.Ed2d 989, 108 S. Ct. 1024 (1988), the Florida District Court of Appeal, Second District, affirmed the dismissal, stating that:

> "... to the extent that the actions of the state [of Florida] and its agencies are protected by sovereign immunity, an action pursuant to section 1983 will not lie in state courts. The question of whether that sovereign immunity exists is a question of state law and not federal law." (A2, emphasis added).

Restating its holding, the court continued:

> "In both the trial court and on appeal, appellant argued that the question of whether a state has maintained its common law sovereign immunity from a section 1983 suit in its state courts is a question of federal law. It is not." (A2, emphasis added).

The court then concluded by

> "the question of whether a state has waived its own common law immunity in its courts is a question of state law. Appellant's primary argument thus fails and the trial court judgment must be affirmed." (A3, emphasis added).

Reasons Why the Writ of Certiorari Should Be Issued

The conclusion of the court below begs the question. It is literally true that "whether a state has waived its own common law immunity in its own courts is a question of state law." (A2). This is necessarily so. Only a state can waive its own immunity. By definition, a waiver is "[t]he intentional

2. A third question presented was

> "III
>
> "WHETHER IT IS NECESSARY TO EXHAUST STATE REMEDIES UNDER THE FLORIDA ADMINISTRATIVE PROCEDURE ACT BEFORE BRINGING AN ACTION FOR DAMAGES IN A FLORIDA COURT UNDER SECTION 1983?"

As stated in footnote 1 above, the Florida appellate court expressly did not reach this third question since it affirmed the circuit court's dismissal solely on the basis of sovereign immunity (A3).

relinquishment of a known right." **Black's Law Dictionary**, Third Edition, 1944 (West Publishing Co., St. Paul, Minn.). A waiver, however, presupposes the existence of a right to be waived. If there is no underlying right, it is immaterial to argue that it has not been waived. If under federal law a state school board has no immunity from an action under Section 1983 in state courts, it is immaterial to argue that the state has not waived whatever immunity it might have had. Such an argument fails if the school board's immunity has been waived for it, and without its consent, by operation of federal law. It was error, therefore, for the court below to decide that the School Board enjoyed im- munity from suit under Section 1983 merely because the state has not waived its immunity under Florida law. That is the beginning rather than the end of the question.

Under the Supremacy Clause, the "Laws of the United States" are the "supreme Law of the Land" and "the Judges of every State [are] bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (Constitution, Article VI, Section 2). Section 1983 is a law of the United States. In **Martinez v. California**, 444 U.S. 277 (1980), suit was brought in a California court under Section 1983 against a state official who raised the defense of immunity conferred upon him by a statute of California. This court said:

> "It is clear that the California immunity statute does not control this claim [under Section 1983] even though the federal cause of action is being asserted in the state courts." **Ibid.** 284.

In a footnote this court explained:

> "Conduct by persons acting under color of state law which is wrongful under 42 USC s. 1983 or s. 1985(3) [42 USCS s. 1983 or s. 1985(3)], **cannot be immunized by state law.** A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. See McLaughlin v. Tilendis, 398 F2d 287, 290 (7th Cir 1968). **The immunity claim raises a question of federal law.** Hampton v. Chicago, 484 F2d 602, 607 (CA7 1973), cert denied, 415 US 917, 39 L Ed 2d 471, 94 S Ct 1413, 94 S Ct 1414." **Ibid.**, emphasis added).

The court below attempted to distinguish **Martinez**. It said that the California statute in that case "sought to immunize state officials from [liability for] injuries resulting from particular conduct" and did not attempt to close the courts of California generally to all actions under Section 1983. From this the court below reached the conclusion that "**Martinez** does not pertain to the question of state common law immunity...." (A3). The Florida court read **Martinez** to mean that even though a state could not immunize particular conduct under Section 1983, nevertheless it was free to immunize itself and its subdivisions generally by prohibiting "the use of its courts for suits against the state in those state courts." (A3). In other words, the court below read **Martinez** to mean that a state could immunize itself and its subdivisions completely, but not partially, from an action under Section 1983 in its own courts.

Against that strained construction of **Martinez** is this court's own construction of **Martinez** in **Felder v. Casey**, ___ U.S. ___, 101 L.Ed2d 123 (1988):

> "States, however, may no more **condition** the federal right to recover [under Section 1983] for violations of civil rights **than bar that right altogether**, particularly where those conditions grew out of a waiver of **immunity** which, however necessary to the assertion of state-created rights against local governments, is **entirely irrelevant** insofar as the assertion of the federal right is concerned, see Martinez, 444 U.S. at 284." **Ibid.**, at 141-2 (emphasis added).

Martinez and **Felder**, read together, made it clear that under federal law the liability of state subdivisions and their employees to Section 1983 actions in state courts is "essentially" a question of "pre-emption", **Felder**, **supra**. at 138. Preemption operates as a matter of federal law under the Supremacy Clause. **Felder**, **ibid**. It does not depend upon whether, as in **Martinez**, the state sought to create a new immunity for particular officials, or whether, as in **Felder**, the state sought to condition a waiver of immunity upon conditions not found in Section 1983. In either case federal law controls. Only those "certain immunities for state officials" which federal law itself recognizes, **Felder**,

supra. at 139, apply when a Section 1983 action is brought in a state court, just as they apply when it is brought in a federal court.

The conclusion follows that the question of state immunity to an action brought under Section 1983 in a state court is a question of federal and not state law. Certiorari should be granted to correct the error of the Florida court below in arriving at the opposite conclusion.

II

Under controlling federal law a Florida school board is not immune from suit under Section 1983. **Mt. Heathly City School Board of Education v. Doyle**, 429 U.S. 274 (1977). **Mt Healthy** was brought in a federal court and this court raised the question sua sponte whether the Ohio city school board partook of the sovereign immunity of the state protected by the Eleventh Amendment. Finding that under Ohio law the city school board had its own treasury and its own taxing authority, the court concluded that an Ohio city school board

> "is more like a county or city than it is like an arm of the State [and is] not entitled to assert any Eleventh Amendment immunity from suit in the federal courts." **Ibid.**, at 281.

A reference to Florida law shows that a Florida school district, like an Ohio city school district, has "extensive power to issue bonds," **ibid.**, 280 (See Section 236.37, Fla.Stat. (1987)) and power "to levy taxes," **ibid.**, (See Section 236.35, Fla.Stat. 1987)). Accordingly, it is "not entitled to assert any Eleventh Amendment immunity from suit in the federal courts." Ibid.

The same result follows where a Florida school board is sued under Section 1983 in a state court, as here. The federal cause of action under Section 1983 "cannot be immunized by state law." **Martinez, supra**, 284, n. 8. Its only chance of immunity is under federal law. Not being immune under federal law, **Mt.**

Healthy, supra, a Florida school board has no immunity, whether sued in a federal or a state court. **Martinez, supra.**

The conclusion follows that the School Board in this case is not immune from suit under Section 1983 in a Florida court. Certiorari should be granted to enforce this result.

III

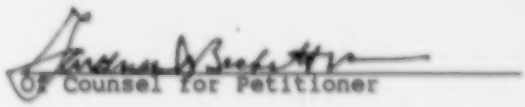
This petition does not present the question whether the State of Florida itself is immune from suit under Section 1983. That question is pretermitted by the fact that a state is not a "person" as that word is used in Section 1983. **Will v. Michigan Department of Police**, ___ U. S. ___, 105 L.Ed2d 45 (1989).

IV

The error of the Florida court below is widespread and should be corrected. See **Moss v. Robertson**, 712 S.W.2d 351 (Ky. Ct.App. 1986)(dismissing Section 1983 action against county clerk sued individually;; **McMahon v. Lopez**, 199 Cal.App.3d 829, 245 Cal. Rptr. 172 (1988) (Section 1983 not available against counties); **Jeffers v. Ray County**, 750 S.W.2d 599 (Mo.Ct.App. 1988) (counties); **Evans v. Clayton County**, 182 Ga.App. 613, 356 S.E.2d 553 (1987)(counties); **Carbone v. Overfield**, Case No. 44291 Cuyahoga County Ct.App. Ohio, July 1, 1982) (Section 1983 does not abrogate Ohio doctrine of sovereign immunity), rev'd on other grounds, 6 Ohio St.3d 212, 451 N.E.2d 1129 (1983) (no sovereign immunity defense in negligence action against board of education); **Cepeda v. Coughlin**, 513 N.Y.S.2d 528 (App.Div.) (statutory restriction of jurisdiction of claims against certain state employees), leave to appeal denied, 70 N.Y.2d 602, 512 N.E.2d 550, 518 N.Y.S.2d 1024 (1987).

Conclusion

Certiorari should be granted and the judgment under review should be reversed with instructions to reinstate the complaint for further proceedings.



Of Counsel for Petitioner